SUPREME COURT, U. S.

DEC 9 1974

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-569

WILLIAM S. ELLIS, JR.,

Petitioner,

v.

HAWAII,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF HAWAII

BRIEF FOR RESPONDENT STATE OF HAWAII IN OPPOSITION

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United States
In the Supreme Court of the

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Respondent State of Hawaii prays that the writ of certiorari to review the Judgment of Contempt entered by the Supreme Court of the State of Hawaii in the case (captioned "In the Matter of the Unauthorized Practice of Law of WILLIAM S. ELLIS, JR., Trustee for the creditors and shareholders of Kula Development Corporation) be denied.

OPINIONS BELOW

The Judgment of Contempt entered by the Supreme Court of the State of Hawaii on June 13, 1974, is reproduced as Appendix A. The opinion of the Supreme Court of the State of Hawaii adjudicating Petitioner to be in contempt of Court has not yet been reported and is reproduced as Appendix B. The opinion of the Supreme Court of the State of Hawaii permanently enjoining Petitioner from the further unauthorized practice of law is reported in 53 Haw. 23 (1971) and is reproduced as Appendix C.

QUESTIONS PRESENTED

1. Can the Supreme Court of the State of Hawaii legally enjoin Petitioner from practicing law in a representative capacity?

2. Can the Supreme Court of the State of Hawaii legally enjoin Petitioner from the unauthorized practice of law in a federal forum, provided that such injunction is not inconsistent with any established rules, orders or practices of the federal courts controlling the practice of law in respect to matters within their jurisdiction?

JURISDICTION

Respondent verily believes that Petitioner has not satisfied the jurisdictional requirements set forth in Rule 19-1(a). of the Rules of the Supreme Court of the United States.

Petitioner has alleged no facts which could be construed to be a federal question of substance nor has Petitioner cited any prior decision of this Honorable Court which is not in accord with the decision of the Supreme Court of the State of Hawaii.

STATUTES INVOLVED

Relevant statutes are set forth in toto in Appendix D of this brief in opposition.

STATEMENT OF THE CASE

Petitioner in his petition makes numerous representations which are clearly unsupported by the record of this proceeding. At all times the record patently indicates that Petitioner was afforded all the rights and privileges of due process of the law. During the contempt proceedings, it was made abundantly clear to Petitioner by the Court that he could appear pro se, because in this proceeding Petitioner was the real party in interest. Petitioner's belief that he could not defend himself pro se in the contempt proceeding stems from his own erroneous assumption, which has as its foundation Petitioner's misinterpretation of the scope and magnitude of the injunctive order. If Petitioner had retained legal counsel as he should have, he would have been fully aware of his rights in the contempt proceedings.

Petitioner's representation that he is being discriminated against by the "Nisei consensus-controlled State courts" is wholly unsubstantiated on the record except for Petitioner's *own* testimony and affidavit.

ARGUMENTS

I

Petitioner, Mr. William S. Ellis, Jr., is not presently, nor has he at any time in the past been, licensed to practice

law in the State of Hawaii or any other jurisdiction. Despite this, Petitioner appeared and argued numerous times before the courts of the State of Hawaii in matters, in which he was *not* deemed to be the real party in interest. Consequently, the Supreme Court of the State of Hawaii in the case of *In the Matter of Unauthorized Practice of Law of William S. Ellis, Jr., Trustee for Creditors and Shareholders of Kula Development Corporation,* by order dated and entered on September 23, 1971, permanently enjoined Petitioner from further engaging in this unauthorized practice of law. The Court in its opinion made it abundantly clear that Petitioner was enjoined from the practice only when he did so in a representative capacity, that is to say when he *was not* the real party in interest

> "In all courts of the United States the *parties* may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein." (28 U.S.C.A. § 1654) (Emphasis added)
>
> "No person shall be allowed to practice in any court of record or before a circuit judge at chambers, unless he has been duly licensed so to do by the supreme court; provided, that nothing in this chapter shall prevent any person, plaintiff, defendant, or accused, from appearing in person before any court, or justice, and there prosecuting or defending his own cause, without the aid of legal counsel." (H.R.S. § 605-2)

which enlightened courts define as:

> "We think the words 'the parties,' as used in the statute, mean the parties in interest—the *real*, beneficial owners of the claims asserted in the suit, and by implication that it excludes agents and attorneys in fact and confines the representation, where the party whose rights are actually involved does not appear in person, to attorneys and counselors at law." (*Heiskell v. Mozie*, 82 F.2d 861, 863 (D.C.Cir. 1936) (Emphasis added)
>
> "We deem the interpretation of the counterpart Federal Rules to be highly persuasive upon this court in the

construction of our Rules, . . ." (*Ellis v. Crockett*, 51 Haw. 45, 61, 451 P.2d 814, 824)

Thus, the opinion rendered by Justice Kobayashi can in no way be interpreted as denying Petitioner his right as guaranteed by 28 U.S.C.A. § 1654 to appear pro se in any case where Petitioner is before the Court as the real party in interest.

Justice Kobayashi in his opinion held Petitioner not to be the real party in interest based on his construction of the relevant state law, H.R.S. §§ 416-123 and 124, as reproduced in Appendix D. This Honorable Court has held in a long line of cases that the construction given to a state statute by that state's highest court must be accepted and is not subject to review by the Supreme Court of the United States. (*Cramp v. Board of Public Instruction of Orange County, Florida*, Fla. 1961, 368 U.S. 278, 82 S.Ct. 275, 7 L.Ed.2d 285; *Barner v. State of Louisiana, La.* 1961, 368 U.S. 157, 82 S.Ct. 248, 7 L.Ed.2d 207)

Therefore, Justice Kobayashi's determination as to Petitioner's status must stand and since he is not a real party in interest, he does not come under the protection of 28 U.S.C.A. § 1654 which by case law is restricted to real parties in interest. Thus the injunction entered by the Supreme Court of the State of Hawaii against Petitioner's unauthorized, representative practice of law *was not* unlawful and violated none of Petitioner's civil rights.

II

Petitioner seeks a review by this Honorable Court of a criminal contempt judgment entered by the Supreme Court of the State of Hawaii for violating, by filing legal documents in a representative capacity in the United States District Court for the District of Hawaii, an injunctive order prohibiting his further unauthorized practice of law.

To reiterate (Respondent cannot over-emphasize this point) if Petitioner was unaware of his right to defend the contempt charge pro se, it was only because his lack of legal competence led him to a misinterpretation of the opinion of the Supreme Court of Hawaii. If Petitioner had retained counsel, he would not have assumed away his rights. However, the record clearly indicates that the Supreme Court of the State of Hawaii, while hearing arguments on the contempt proceedings, informed Petitioner that in this proceeding he was the real party in interest and thus could appear pro se. After this information was conveyed to Petitioner, he addressed the Court and argued the merits of the contempt charge. So at no time was Petitioner denied the right to practice law in the State of Hawaii when he was the real party in interest.

In *Depew v. Wichita Ass'n. of Credit Men*, 142 Kan. 403, 49 P.2d 1041, cert. denied 297 U.S. 710 (1935), a trial court had issued an injunction restraining a corporation from bringing collection of account actions in the justice of peace courts and filing petitions in the District Court of the State of Kansas. These acts were considered the practice of law for which the corporation was unauthorized to do. The court, however, believing it had no jurisdiction over such matters, had not included in the injunction the actions of the corporation in bankruptcy cases in the federal courts. The Kansas Supreme Court disagreed with the lower court's reservation and extended the injunctive power of the state court into the federal court.

"We are of the opinion that the trial court did have jurisdiction in the matter of proceedings enumerated as taking place in bankruptcy proceedings in the federal court, and could and should have made an appropriate conclusion which should have been to the effect that such acts on the part of the defendants as enumerated in finding No. 5 were the practice of law and such acts should therefore have been included in the injunction order. . . ." (49 P.2d at 1049)

In the *Petition of Kearney*, 63 So.2d 630 (1953), the petitioner, a licensed practitioner before the United States Supreme Court, the Tax Court of the United States and the United States Treasury Department wanted to practice solely as "a Federal Tax Counsel" limited to appearances only in the federal courts and agencies located in Florida. The Supreme Court of Florida, en banc, held that the practice of law in the federal district courts of Florida was tantamount to the practice of law in that state and required as a prerequisite admission into the local bar. It stated:

"The American Bar Association is committed to like policy and holds, as do many states, that practice before the Tax Court and Treasury Department of the United States may constitute the practice of law which may be enjoined if attempted by one not admitted to practice. . . ." (63 So.2d at 630)

The rationale of the decision was that the practice contemplated by the petitioner was not within the exclusive jurisdiction of the federal courts, but within the rules of procedure and the laws of Florida.

The conception that the practice of law in a federal court is necessarily a practice of law in the state that that court is located was amplified in *In re Lyon*, 301 Mass. 30, 16 N.E.2d 74 (1938). In this case a collection agency unlicensed to practice law in the state frequently represented creditors in bankruptcy proceedings in the federal court. In upholding the state injunction against such practices with modifications, the Supreme Court of Massachusetts said:

". . . The regulation in the public interest of occupations and professions such as those of law, medicine and others which, if uncontrolled, may develop methods and practices inimical to the public welfare, is historically and logically, and we think also legally, a matter primarily of State concern. Practice as an attorney in bankruptcy and other litigation in Federal courts commonly is not confined to acts performed in court or before judicial officers. . . . Ordinarily it involves the maintenance of a place of business and the doing of acts similar to and concurrent with those done in relation to proceedings in State courts. When such practice is carried on by unauthorized persons the resulting evils are the same and reach out into the community in the same way as if the subject matter related to litigation in State courts. It would be almost impossible to separate the practice of law by persons practicing in both jurisdictions into two watertight compartments, and regulation based upon an attempt to do so involving joint or complementary action by each jurisdiction as to each item of conduct would be weak and ineffectual. . . ." (16 N.E.2d at 76)

Hence, in accordance with the holdings of these cases, it can be asserted that the injunction of the Supreme Court of the State of Hawaii upon Petitioner extended to and did enjoin any legal proceedings that he might bring in the Federal Court in Hawaii. When Petitioner subsequently filed the legal papers as trustee pro se in the Federal Court, he violated this injunction and he is in contempt of the court order.

In re Lyon, supra, also stands for the proposition that a state court may restrain the practice of law before federal courts and agencies provided that the person so restrained is not otherwise authorized to engage in such practice by federal rules, statutes or orders. In modifying the injunction to that extent, the court said:

"The discussion on this point starts with the premise that we have neither power nor inclination to interfere in any way with proceedings in Federal courts, or before officers appointed by them. We further concede fully the

Federal power finally to determine who shall practice law before these courts or officers. . .." (16 N.E.2d at 76)

In addition the court said:

". . . We concede that our policy and our statute must yield to any valid rule, order or established practice of the federal courts controlling the practice of law in respect to matters within their jurisdiction. . . . [I]f it be true, as the respondents contend that federal law permits a layman to make a business of representing creditors to some extent in bankruptcy proceedings, we do not undertake to interfere with the exercise of that privilege. . . ." (16 N.E.2d at 77)

There is no incompatibility between rules of the State Supreme Court of Hawaii and that of the United States District Court for the District of Hawaii as to the qualifications of persons who can appear before the Federal Court. The pertinent provision of the State Supreme Court is Rule 15, reproduced in Appendix E, which outlines the residential and academic requirements. The Federal Court precludes the possibility of such incompatibility by incorporating these state requirements through Rule 1 of the Civil Procedure for the United States District Court for the District of Hawaii, reproduced in toto in Appendix E, the pertinent subparagraphs which read, as follows:

"(b) *Eligibility.*

Any attorney licensed to practice in all courts of the State of Hawaii, and in good standing therein, is eligible for admission to the bar of this court.

"(c) *Procedure for Admission. Active and Inactive Members.*

(1) Each applicant for admission to the bar of this court shall file with the clerk a verified petition for such admission stating his full name, his residence address, his office address, the date he was admitted to practice in all courts of the State of Hawaii and that he is in good standing therein. . . ."

"(h) *Discipline and Disbarment.*

* * *

(5) Any person who has not been admitted to the bar of this court, or who has been so admitted but is an inactive member of the bar of this court, or who has been suspended or disbarred therefrom and not reinstated or readmitted to active membership in such bar, and who, without complying with, or in violation of, the requirements of this Rule, exercises in this District any of the privileges of a member of said bar, or pretends to be entitled to do so, is guilty of contempt of court."

The reason for the lack of detailed federal admission requirements substantially different from the state requirements was explained in *In re Disbarment of Abraham J. Isserman*, 345 U.S. 286, 97 L.Ed. 1013, 73 S.Ct. 676 (1953). Chief Justice Vinson stated:

> "This Court (as well as the federal courts in general) does not conduct independent examinations for admission to its bar. To do so would be to duplicate needlessly the machinery established by the states whose function it has traditionally been to determine who shall stand to the bar. Rather our rules provide for eligibility in our bar of those admitted to practice for the past three years before the highest court of any state. The obvious premise of the rule is the confidence which this Court has in the bars maintained by the states of the Union. . . ." (345 U.S. at 287)

The rules of Hawaii's Supreme Court do not prohibit a person from practicing law in a federal court when federal court rules so permit. Collating the admission rules of Hawaii and the federal bars, it stands that if Petitioner is not a member of the Hawaii Bar and ineligible to practice law in Hawaii's courts, he cannot practice law either in the United States District Court for the District of Hawaii or the United States Court of Appeals for the Ninth Circuit.

CONCLUSION

For the foregoing reasons, Respondent State of Hawaii respectfully requests this Honorable Court to deny certiorari to Petitioner.

Respectfully submitted,

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Attorney General
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NELSON S. W. CHANG
Deputy Attorney General
State of Hawaii

Attorneys for Respondent
State of Hawaii

December 6, 1974

CERTIFICATE OF SERVICE

I hereby certify that three copies of this Brief in Opposition were served upon WILLIAM S. ELLIS, JR., 12 N. King Street, Room 17, Honolulu, Hawaii 96817, Petitioner Pro Se, by mailing the same to him, postage prepaid, on December 4, 1974.

NELSON S. W. CHANG
Deputy Attorney General
State of Hawaii

Attorney for Respondent
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Appendix A

No. 5044.

IN THE SUPREME COURT OF THE STATE OF HAWAII.

OCTOBER TERM 1973.

In the Matter of the Unauthorized Practice of Law of WILLIAM S. ELLIS, JR., trustee for the creditors and shareholders of Kula Development Corporation.

JUDGMENT OF CONTEMPT

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No. 5044.

IN THE SUPREME COURT OF THE STATE OF HAWAII.

OCTOBER TERM 1973.

In the Matter of the Unauthorized Practice of Law of WILLIAM S. ELLIS, JR., trustee for the creditors and shareholders of Kula Development Corporation.

JUDGMENT OF CONTEMPT.

In accordance with this Court's opinion filed May 3, 1974 in which it was adjudged that Mr. William E. Ellis, Jr. stands in contempt of this Court;

IT IS HEREBY ORDERED that Mr. William S. Ellis, Jr. pay a fine of $250.00 to the Chief Clerk of this Court on or before June 10, 1974.

DATED: Honolulu, Hawaii, this 13 day of June, 1974.

(Signed) WILLIAM A. RICHARDSON
Chief Justice

Appendix B

IN THE SUPREME COURT OF THE STATE OF HAWAII.

OCTOBER TERM 1973.

In the Matter of the Unauthorized Practice of Law of MR. WILLIAM S. ELLIS, JR., Trustee for the Creditors and Shareholders of Kula Development Corporation.

NO. 5044.

MOTION FOR ORDER TO SHOW CAUSE.

MAY 3, 1974.

RICHARDSON, C.J., LEVINSON, KOBAYASHI AND OGATA, JJ., AND CIRCUIT JUDGE VITOUSEK ASSIGNED TEMPORARILY BY REASON OF VACANCY.

INJUNCTIONS—*unauthorized practice of law—definition.*

A final judgment of a state's highest court permanently enjoining a person from engaging further in the unauthorized practice of law is not impliedly limited in applicability to the state court system, but also clearly enjoins such person from the practice of law in a federal court of such state.

SAME—*same—authority of a state's highest court.*

A state's highest court has the authority to enjoin a person's unauthorized practice of law in a federal forum within that state, so long as there are no rules, orders, or practices of the relevant federal court that would conflict with the terms of such injunction.

SAME—*same—enforceability.*

Proper action taken by the highest court of a state to punish for violation of the terms of an injunction forbidding the unauthorized practice of law in a federal forum is not inconsistent with any exclusive jurisdiction vested in a federal forum, so long as there are no rules, orders, or practices of the relevant federal court that would conflict with the terms of such injunction.

Per Curiam. As one of the very few and unique exceptions to the general rule that one not licensed to practice law before this Court is absolutely forbidden to engage in legal practice within this State, we held in *In Re Ellis*, 53 Haw. 23, 31, 487 P.2d 286, 291 (1971), *cert. den.*, 405 U.S. 1075 (1972), that Mr. William S. Ellis, Jr., as trustee for the creditors and stockholders of Kula Development Corporation, a dissolved Hawaii corporation, might continue to render services of a legal nature to the dissolved corporation, providing that a determination of imperative financial necessity therefor be subsequently made by a master to be appointed pursuant to an order of this Court.

The key subsequent events relevant to, and following, our decision in *In Re Ellis, supra*, are noted chronologically, *infra*. As all events pertinent herein are matters of record and, as there is, and can be, no disputation made as to the facts stated with reference to these events, we think it eminently proper to take judicial notice thereof.

(a) In an order filed August 10, 1971, pursuant to our opinion in *In Re Ellis, supra*, Mr. Ellis was enjoined from engaging further in the unauthorized practice of law, except as should be necessarily incident to an appearance (as trustee for the creditors and shareholders of the dissolved Kula Development Corporation) before a master to be designated by the assignment judge of the circuit court, first circuit.

(b) The Hon. Masato Doi, a judge of the circuit court, first circuit, having been designated as master on August 12, 1971, the matter of the financial status of Kula Development Corporation came on for initial hearing September 9, 1971. Mr. Ellis declined to appear before Judge Doi in a letter to Judge Doi, received September 9, and Judge Doi subsequently filed a notice with this Court that, in light of the knowing refusal of Mr. Ellis to appear in his capacity as sole trustee for the creditors and shareholders of Kula Development

Corporation, he (Judge Doi) was unable to make an intelligent assessment of the corporation's financial condition.

(c) Subsequent to, and because of, the above noted events, Mr. Ellis, as such trustee, was permanently enjoined from engaging further in the unauthorized practice of law, by final judgment of this Court, filed September 23, 1971.

(d) Beginning in April, 1973, and extending at least through May 17, 1973, Mr. Ellis, as such trustee, filed in the United States District Court for the District of Hawaii, numerous papers, signed by him, including but not limited to, various petitions, requests for service, complaints, claims, joinder in pleadings and cross-claim, appearances, objections to motions, suggestion of recusal, motions to disqualify opposing counsel, other and novel forms of legal pleading—together with legal memoranda and appendices thereto. We conclude that these papers were prepared by Mr. Ellis himself.

(e) On February 6, 1974, pursuant to a motion filed therefor, this Court issued to William S. Ellis, Jr., respondent, an order to show cause why he should not be held in contempt of court for violation of the injunction embodied in this court's final judgment of September 23, 1971, *supra* (c), in the particulars summarized, *supra* (d), and detailed in an 85 page affidavit in support of the motion for such order to show cause, service of which motion and affidavit on Mr. Ellis having been made December 26, 1973.

(f) Subsequently, at our request, an *amicus curiae* brief was filed by the State Attorney General, a counter-affidavit in opposition to the charge of contempt was filed by respondent Ellis, and other supplemental and answering memoranda were filed with this Court. The counter-affidavit of respondent Ellis admits and does not dispute any of the matters of record in the federal court, *supra* (d), detailed in the affidavit filed in support of the motion for an order to show

cause. This matter was argued before us, March 12, 1974, the designated return date for the order to show cause.

There can be, and is, no doubt that Mr. Ellis has openly and continually ignored the order of this Court, dated September 23, 1971, enjoining him from the further unauthorized practice of law. We further observe, based upon the record and the circumstances of this case, as well as of the other cases in this Court in which Mr. Ellis has appeared *pro se*,[1] that the violations of this Court's final judgment of September 23, 1971, were not innocent, but rather that respondent Ellis intentionally, knowingly, and wilfully flouted the terms of said final judgment.

Said final judgment was absolute and unambiguous in its terms and provided clearly as follows:

> IT IS HEREBY ORDERED AND ADJUDGED that William S. Ellis, Jr., trustee for the creditors and stockholders of Kula Development Corporation, is permanently enjoined from engaging further in the unauthorized practice of law.

The order is neither expressly nor impliedly limited in applicability to the state court system only. There is, and can be, no colorable argument made that the order is so limited by its actual terms. Furthermore, there can be no doubt that the "practice of law" engaged in by Mr. Ellis in the federal district court of this State is legally tantamount to the practice of law within this State and is thus covered by the orders and rules of the state's highest court regarding the practice of law, *Petition of Kearney*, 63 So. 2d 630 (Fla. 1953). Therefore, said "practice of law" is controlled by the injunctive order embodied in our final judgment of September 23, 1971, and Mr. Ellis is in violation thereof.

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1 *See, Haruda v. Burns*, 50 Haw. 528, 445 P.2d 564 (1968), *cert. den.*, 393 U.S. 1106 (1969); *Ellis v. Crockett*, 51 Haw. 45, 451 P.2d 814 (1969); *MDG Supply v. Diversified Investment*, 51 Haw. 375, 463 P.2d 525 (1969), *cert. den.*, 400 U.S. 868 (1970); *MDG Supply v. Ellis*, 51 Haw. 480, 463 P.2d 530 (1969); *MDG Supply v. Calmes*, 52 Haw. 154, 472 P.2d 199 (1970).

The only remaining questions then are (1) whether this Court, the highest court of the state of Hawaii, has the authority to enjoin a person's unauthorized practice of law in a federal forum, and then (2) whether action taken by this Court, the highest court of the state of Hawaii, to punish for violation of such an injunction is proper as not inconsistent with any exclusive jurisdiction vested in the federal district court. The answers to both of these legal questions are in the affirmative. *In Re Lyon*, 301 Mass. 30, 16 N.E.2d 74 (1938). That case, which we find very persuasive, clearly held that the highest judicial court of a state has jurisdiction to control the unauthorized practice of law in a federal forum.

> The regulation in the public interest of occupations and professions such as those of law, medicine and others which, if uncontrolled, may develop methods and practices inimical to the public welfare, is historically and logically, and we think also legally, a matter primarily of State concern. . . . When such practice is carried on by unauthorized persons the resulting evils are the same and reach out into the community in the same way as if the subject matter related to litigation in State courts. It would be almost impossible to separate the practice of law by persons practising in both jurisdictions into two watertight compartments and regulation based upon an attempt to do so involving joint or complementary action by each jurisdiction as to each item of conduct would be weak and ineffectual. 301 Mass. at 34-35, 16 N.E.2d at 76.

With regard to the second issue, as to whether the highest state court could enforce a law forbidding practice of law by unauthorized, unlicensed persons, *In Re Lyon*, *supra*, held that it could.

> [W]e see no reason why our policy or statute should give way in favor of persons who seek to escape State regulation of the practice of law on the ground that their practice is within the field of Federal jurisdiction, when they are not authorized to practise in that jurisdiction. Within these limits enforcement of our act according to its terms does not interfere with any Federal function. 301 Mass. at 35-36, 16 N.E.2d at 77.

The *Lyon* court further noted that, lacking, as do we, any inclination to interfere with federal court proceedings, it would, of necessity, yield to "any valid rule, order or established practice of the federal courts controlling the practice of law in respect to matters within their jurisdiction." 301 Mass. at 35, 16 N.E. 2d at 77. Here, there are no such conflicting rules, conflicting orders, or conflicting federal court practices. There can be no such conflict for the reason that the United States District Court for the District of Hawaii by its own rules depends on this Court to determine who may or may not practice law before it.[2]

For his violation of the injunctive order in the final judgment of this Court, filed September 23, 1971, *supra* (c) in the manner set forth in summary form, *supra* (d), which is a violation of S.L.H. 1972, Act 9, § 1, sec. 1077 (1) (g), this Court, electing to proceed under S.L.H. 1972, Act 9, § 1 sec. 1077(3) (b), and all pertinent facts herein being undisputed as matters of court record, and susceptible of judicial notice, and no provision of HRS ch. 605 requiring otherwise by virtue of HRS § 605-16,

IT IS HEREBY ADJUDGED that Mr. William S. Ellis, Jr., stands in contempt of this Court, and,

IT IS HEREBY ORDERED that Mr. William S. Ellis, Jr., pay a fine of $250 to the Chief Clerk of this Court on or before June 10, 1974.

EDWARD A. JAFFE
(Cades, Schutte, Fleming
& Wright of counsel)
for the motion.

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[2] Rule 1 of the *Rules for the United States District Court for the District of Hawaii* provides in essence that, with the exception of instances not here relevant, only those who are permitted to practice in the state court system may practice in the federal district court. It is evident, then, that Mr. Ellis's practice of law before the federal district court was improper under the final judgment of this Court enjoining him from the further unauthorized practice of law. Rule 1(b), *Rules for the United States District Court for the District of Hawaii.*

WILLIAM S. ELLIS, JR.,
pro se, contra.

NELSON S. W. CHANG,
Deputy Attorney General,
for State of Hawaii, *amicus curiae*.

(Signed) WILLIAM R. RICHARDSON
BERNARD H. LEVINSON
BERT T. KOBAYASHI
THOMAS S. OGATA
BETTY M. VITOUSEK

Appendix C

IN THE SUPREME COURT OF THE STATE OF HAWAII.

OCTOBER TERM 1970

In the Matter of the Unauthorized Practice of Law of Mr. William S. Ellis, Jr., trustee for the creditors and shareholders of Kula Development Corporation.

ORIGINAL PROCEEDING.

OPINION OF THE COURT.

IN THE SUPREME COURT OF THE STATE OF HAWAII.

OCTOBER TERM 1970

IN THE MATTER OF THE UNAUTHORIZED PRACTICE OF LAW OF MR. WILLIAM S. ELLIS, JR., TRUSTEE FOR THE CREDITORS AND SHAREHOLDERS OF KULA DEVELOPMENT CORPORATION.

No. 5044.

MOTION FOR PERMANENT INJUNCTION.

JUNE 25, 1971.

RICHARDSON, C.J., MARUMOTO, ABE, LEVINSON AND KOBAYASHI, JJ.

CORPORATIONS—*dissolution and forfeiture of franchise—actions by or against corporation after dissolution—statutory liquidators.*

The former directors as statutory liquidators are proper and necessary parties to legal proceedings aimed at winding up the affairs of a dissolved corporation. HRS § 416-124.

SAME—*same—effect of dissolution on corporate property—HRS § 416-124.*

The word "title" in HRS § 416-124 is loosely used for the property of a dissolved corporation actually belongs to those persons who were stockholders at the time of its dissolution, the right to possession passing to the former directors by force of the statutory provision making them statutory liquidators to settle the corporate affairs.

ATTORNEY AND CLIENT—*retainer and authority—rights of litigants to act in person—HRS § 605-2.*

HRS § 605-2 permits a person to represent himself pro se in the courts of this state if that person by the substantive law has the right sought to be enforced, or put differently, is the real party in interest.

CORPORATIONS—*dissolution and forfeiture of franchise—actions by or against corporation after dissolution—real parties in interest.*

Stockholders of a dissolved corporation are the real parties in interest upon claims in favor of or against the corporation at the time of dissolution, their interests subject to the liens of creditors.

CORPORATIONS—*dissolution and forfeiture of franchise—statutory liquidator—rights and duties.*

ATTORNEY AND CLIENT—*retainer and authority—rights of litigants to act in person.*

The function of a statutory liquidator of a dissolved corporation (HRS § 416-124) does not include the right to present argument pro se because in this capacity he is representing the interest of others and is engaged, therefore, in the unauthorized practice of law.

CONSTITUTIONAL LAW—*due process of law—deprivation of property—actions by or against a dissolved corporation.*

Due process requires that in judicial proceedings winding up the affairs of a dissolved corporation, a stockholder or creditor may not be deprived of his property without his "day in court."

ATTORNEY AND CLIENT—*unauthorized practice of law—unique exception.*

Where a statutory liquidator, not an attorney in this state, makes a showing that the assets of a dissolved corporation are insufficient to hire an attorney for purposes of judicial proceedings aimed at winding up corporate affairs, public policy and constitutional guarantees dictate that in this limited situation this court make a unique exception to our prohibition against one engaging in the unauthorized practice of law, and that he be allowed to perform the necessary legal services.

This is an original action[1] brought before this court by James S. Campbell, attorney, seeking a permanent injunction to enjoin the alleged unauthorized practice of law by William S. Ellis, Jr., as trustee for the creditors and stockholders of Kula Development Corporation, a dissolved Hawaiian corporation.

At the time of corporate dissolution Mr. Ellis was both a stockholder and a director. By operation of law[2] he and other directors became trustees for the creditors and stockholders. The records at the State Department of Regulatory Agencies show that thereafter all of Mr. Ellis' co-trustees resigned leaving him as sole trustee.

Mr. Campbell represents one of several creditors of the dissolved corporation. In a First Circuit Court case between his clients as plaintiffs against Kula Development Corporation, et al., as defendants, Mr. Campbell complains that Mr. Ellis practiced law without authority.

Mr. Ellis is not licensed to practice law in this or any other jurisdiction. It is undisputed, however, that in exercising his power as trustee and fulfilling this responsibility, Mr. Ellis has engaged in the practice of law. HRS § 416-124 provides as follows:

"*Trustee; powers, liabilities, duties.* The title to all assets and property, real, personal, and mixed, belonging to the

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[1] This court has inherent power to regulate matters before it regarding the practice of law.
Hawaii Constitution art. V, § 1 provides in part:
"The judicial power of the State shall be vested in one supreme court, circuit courts, and in such inferior courts as the legislature may from time to time establish."
Rules of the Supreme Court, State of Hawaii (1968):
"16(d): *Limitations.* The jurisdiction of this court and the other courts of the State of Hawaii to grant appropriate relief in causes involving unprofessional conduct or unauthorized practice of law shall not be deemed to be limited, restricted or abrogated by anything contained in this rule."
See In re Integration of the Bar, 50 Haw. 107, 432 P.2d 887 (1967).

[2] HRS § 416-123.

corporation shall, immediately upon the dissolution thereof, * * * vest in the trustee or trustees for the creditors and stockholders or members of the corporation dissolved.

"Under the name of the trustee or trustees * * * the trustee or trustees shall have power: to sue for and collect the debts, claims, and demands due to the corporation, or compound and settle any claims as they may deem best; to have, hold, reserve, sell, and dispose of property, real, personal, and mixed; to adjust and pay all debts of the corporation dissolved; * * * to exercise all powers of the dissolved corporation; * * * to divide among the stockholders * * * moneys and other properties that remain after paying the debts and necessary expenses; and they shall be jointly and severally liable to the creditors and to the stockholders * * * to the extent of the corporation property which shall come into their hands. * * *"

Mr. Ellis claims that because of lack of funds in the dissolved corporation, he, as trustee, cannot pay for the services of an attorney and thus is compelled to do all the necessary legal work.

The novel question for us to resolve is whether Mr. Ellis as said trustee, in his pro se practice of law, represents himself as trustee or is, in effect, actually representing the interest of another person and thus is guilty of unauthorized practice of law.

I. THE TRUSTEESHIP OF MR. ELLIS.

At common law, in the absence of statute, when a corporation was effectively dissolved its existence as a legal entity ceased. Dissolution terminated its power to sue or be sued in its corporate name, and extinguished all debts due to or from it.[3]

[3] State v. Libby, 238 Mo. App. 36, 42, 175 S.W.2d 171, 173-74 (1943). *Note, Suits by and Against Dissolved Corporations*, 48 Iowa L. Rev. 1006, 1007 (1963).

To abrogate this rule of the common law, statutes have been enacted in all jurisdictions pertaining to this subject of litigation by and against a dissolved corporation.[4] These statutes take various forms but all are remedial in purpose, removing the common law incapacity of a dissolved corporation to sue or be sued.

Some statutes extend the life of the corporation permitting it to serve as a named party litigant.[5] Others, such as ours here in Hawaii, HRS § 416-123, treat the existence of the corporation as terminated upon dissolution but nonetheless allow suits to be brought or continued. These statutes resulted from a demand by stockholders and creditors for equitable relief and embodied the "trust fund theory" by authorizing the directors at the time of dissolution to serve as trustees.[6] In this capacity the former directors are proper and necessary parties to legal proceedings aimed at winding up the affairs of the dissolved corporation. *State* v. *Libby*, *supra* at 43.

Although captioned "trustee" by these statutes, a more accurate characterization for a former director is that of "statutory liquidator."[7] His function is simply to liquidate the assets possessed as expeditiously as sound business judgment permits.[8] To this end the equally amorphous word "title" is found in HRS § 416-124, *supra*, and in similar statutes.

The word "title" in this context is loosely used. The prop-

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[4] W. Fletcher, 16A Cyclopedia of Corporations § 8143, p. 316 (perm. ed. rev. vol. 1962).

[5] *Id.*

[6] *Id.* at 322-23. *Note, Suits by and Against Dissolved Corporations*, *supra* at 1010.

[7] United States v. Krueger, 121 F.2d 842, 844 (3rd Cir. 1941).

See also Rossi v. Caire, 186 Cal. 544, 199 P.2d 1042 (1921) applying the phrase "trustees in liquidation" at 549.

For criticism of the term "trust" *see* IV Pomeroy, Equity Jurisprudence § 1046 at p. 98 (5th ed. 1941), where in reference thereto the author states "* * * [it] can only be called so by way of analogy and metaphor."

[8] *See* 16A Fletcher, *supra*, § 8178, p. 415.

erty of a dissolved corporation actually *belongs* to those persons who were stockholders at the time of its dissolution, but the right to possession passes to the former directors by force of the statutory provision making them statutory liquidators to settle the corporate affairs. *Jones* v. *Peck*, 63 Cal. App. 397, 401-02, 218 P. 1030, 1032 (1923).[9] In substance therefore, Mr. Ellis as statutory liquidator possesses the property of the former stockholders of the Kula Development Corporation with the power to dispose of so much thereof as is necessary to pay creditors who have alien upon it for their own security.[10]

II. THE RIGHT OF ONE TO REPRESENT HIMSELF.

Mr. Ellis in appearing pro se claims a right to do so under HRS § 605-2 which in part provides:

> "[N]othing in this chapter shall prevent any person, plaintiff, defendant, or accused, from appearing in person before any court, or justice, and there prosecuting or defending *his own cause*, without the aid of legal counsel." (Emphasis added)

Our statute's import mirrors that of an early federal law.[11] While authoritative analysis of HRS § 605-2 is lacking, in matters relating to the conduct of business before our courts the construction of a counterpart federal provision is highly persuasive. *Ellis* v. *Crockett*, 51 Haw. 45, 61, 451 P.2d 814, 824 (1969). We find, therefore, federal pronouncements on 28 U.S.C.A. § 1654, *supra* n.11, helpful in construing the right asserted.

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[9] *Id.* at 420.

[10] *Id.*

See Rossi v. Caire, *supra* at 552-53, where in discussing the subject of "title" the court states that "* * * [assuming] legal title to the property had solely vested in the trustees designated by the statute, * * * [s]ubject to * * * the payment of creditors, the former stockholders were the sole beneficiaries and the absolute owners in equity of the property."

[11] Judiciary Act of 1789, § 35, 1 Stat. 73, 92 (1789) provided that "in all the courts of the United States, the parties may plead and manage their own causes personally * * *."

This identical language is now found in 28 U.S.C.A. § 1654 (1966).

Clearly by statute or otherwise this right of self-representation is available to a person in a civil proceeding.[12] But regardless of the right's derivation or the proceeding where it is invoked, the question is whether one seeking to represent himself pro se is a person who by the substantive law has the right sought to be enforced. Put differently, is Mr. Ellis, in conducting the litigation, the real party in interest? *Heiskell v. Mozie*, 82 F.2d 861, 863 (D.C. Cir. 1936). We think not.

As indicated by the foregoing discussion (Part I), after dissolution, the stockholders of the Kula Development Corporation were the real parties in interest upon all claims in favor of or against this corporation at the time of dissolution. *Clark Estate Co. v. Gentry*, 362 Mo. 80, 91, 240 S.W.2d 124, 130 (1951). Their interests, in turn, were subject to the liens of creditors.

On the other hand, in legal proceedings aimed at winding up the former corporation's affairs, the interest of Mr. Ellis as trustee is remedial in nature and promised upon procedural necessity. *State v. Libby, supra.* The paucity of precedent notwithstanding, as Mr. Ellis' status of "trustee" is intended to insure nothing more than the orderly administration of assets, he may not claim his statutory function includes the right to present argument pro se in the courts of this state. In this capacity he is representing the interests of others, and in judicial proceedings it is our opinion that he is engaged in the unauthorized practice of law.

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[12] Price v. Johnson, 159 F.2d 234 (9th Cir. 1947), *cert. granted* 331 U.S. 804 (1947).

Apart from statute the right is rooted in the common law. *See* following federal and state civil cases: Osborn v. United States, 22 U.S. (9 Wheat.) 738, 829 (1824); Hightower v. Hawthorn, 12 F. Cas. 142 (No. 6,780) (Sup. Ct. Ark. 1826); Arthaud v. Griffin, 202 Ia. 462, 464, 210 N.W. 540, 541 (1926); Americus v. McGinnis, 128 Wash. 28, 30, 221 P. 987, 988 (1924).

In the criminal context authorities are divided whether this right is constitutional as well as statutory. Dearinger v. United States, 344 F.2d 309 (9th Cir. 1965) at 311, n.2.

But whether constitutional or statutory, the right is not absolute and may be qualified under certain circumstances (criminal proceeding). United States v. Davis, 260 F. Supp. 1009, 1019 (E.D. Tenn. 1966).

III. STOCKHOLDERS AND CREDITORS ENTITLED TO PROCEDURAL DUE PROCESS.

The anomaly of this situation gives rise to a constitutional infirmity wherein a stockholder's or creditor's property is subject to deprivation without him having his "day in court."[13] Basic requisites of "due process" guarantee that where property rights may be affected, notice and an opportunity to be heard must be afforded to all interested persons. *Mortensen* v. *Emp. Ret. Syst. Trustees*, 52 Haw. 212, 219-21, 473 P.2d 866, 871-72 (1970); *Territory* v. *Jennie L. Aona et al.*, 43 Haw. 253, 255 (1959). How then are these rights to be protected?[14]

Because of the constitutional dilemma presented, public policy dictates that an exception be made at this time to the prohibition against one engaging in the unauthorized practice of law.[15] In the limited situation where the statutory liquidator makes a showing that corporate funds are unavailable for the hiring of counsel, he may perform the necessary legal services.

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[13] Weinacht v. Bower, 140 Ore. 527, 533, 14 P.2d 622, 625 (1932).

[14] Neither party briefed or argued the issue whether under the facts at hand "a stockholder" in this capacity could appear pro se in his own behalf as well as the representative of other stockholders. At this juncture we do not reach this issue.

In a derivative aciton a stockholder was permitted to appear pro se. Wilhelm v. Murchison, 206 F. Supp. 733 (S.D.N.Y. 1962), *appeal dismissed*, 312 F.2d 389 (2nd Cir. 1964); discussed in 17 Rutgers L. Rev 651 (1963).

Under a similar statutory scheme, the right to assert or defend claims vests by law *exclusively* in the "statutory liquidators" of a dissolved corporation. Clark Estate Co. v. Gentry, *supra* at 86-87.

However a statutory liquidator may be personally liable to a stockholder or creditor for breach of his duty to act with reasonable care and prudence in settling the corporate affairs. McClean v. Bradley, 282 F. 1011 (N.D. Ohio 1922), *aff'd* 289 F.2d 379 (6th Cir. 1924), *cert. denied*, 266 U.S. 619 (1924); King v. Coosa Valley Mineral Products Co., 283 Ala. 197, 215 So. 2d 275 (1968); Mengel Co. v. Pierson, 99 N.J. Eq. 436, 132 A. 78 (1926).

See HRS § 416-125 providing for an accounting action by stockholders or creditors.

[15] Hawaii Const. art. V, § 6 provides:

"The Supreme Court shall have power to promulgate rules and regulations in all civil and criminal cases for all courts relating to process, practice, procedure, and appeals, which shall have the force and effect of law."

IV. CONCLUSION.

Again reiterating, the cornerstone upon which we provide this exception is the claim of insufficient assets. Mr. Ellis asserts that assets are insufficient. Some light is shed on this assertion in a trial statement by Mr. Ellis that he lacks "liquid assets." These terms, however, depending on the circumstances, may be far from synonomous in application. Although an inventory of property has not been provided to this court, it is our understanding that real estate comprises a substantial portion of, if not the total, value of the assets of the former corporation.

In order to determine the current worth of all property involved, we shall appoint under separate order a circuit judge of the first circuit as master to hold an evidentiary hearing on this matter. Should sufficient assets in some form be available to retain an attorney, Mr. Ellis will be directed to do so.[16] If not, to insure those with property rights of their day in court Mr. Ellis, as trustee, will be allowed to continue pro se in his practice of law.

An order will so issue.

JAMES S. CAMPBELL (CADES, SCHUTTE, FLEMLNG & WRIGHT of counsel) for the motion.

WILLIAM S. ELLIS, JR., pro se contra.

(Signed) WILLIAM R. RICHARDSON
MASAJI MARUMOTO
BERNARD H. LEVINSON
BERT T. KOBAYASHI

[16] A statutory trustee may always employ agents to aid him in the performance of his duties should these services be necessary for purposes of winding up the affairs of the corporation. *See* 16A Fletcher, *supra*, § 8179, p. 421 at 422-23.

CONCURRING OPINION OF ABE, J.

I agree with the majority of this court on points I and II and the conclusion that Mr. Ellis "is engaged in the unauthorized practice of law."

The due process issue discussed in point III of the court's decision was not before us because Mr. Ellis did not raise that issue. Therefore, I believe that it is a mistake for this court not only to raise but also to decide the issue sua sponte, especially without any briefing or argument on the question.

KAZUHISA ABE

Appendix D

§416-123 *Proceedings after dissolution; appointment of trustees.* Upon the voluntary dissolution of any corporation, the director of regulatory agencies shall appoint a trustee or trustees with full powers to settle the affairs of the corporation, unless the certificate filed pursuant to section 416-121 states that the corporation has not engaged in any business since incorporation, that no debts of the corporation remain unpaid or undischarged, and that all amounts, if any, paid in on subscriptions, less any amounts disbursed for necessary expenses, have been returned to the subscribers.

Upon the involuntary dissolution of any corporation and unless and until some other person or persons are appointed by the director of regulatory agencies or a court of competent jurisdiction, the directors of any corporation organized for profit, or directors or managers of any nonprofit corporation by whatever name the managers may be called, shall be and act as trustees for the creditors and stockholders or members of the corporation with full powers to settle its affairs; provided, that upon or at any time after the involuntary dissolution of any corporation, the director of regulatory agencies may, whether or not the directors or managers of the corporation shall have undertaken to act as trustees in dissolution, appoint a trustee or trustees for the creditors and stockholders or members of the corporation with the powers to settle its affairs. [CC 1859, §1440; am L 1909, c 135, §1; RL 1925, §3372; RL 1935, §6756; am L 1935, c 158, §2; am L 1937, c 93, §2; am L 1939, c 95, §3; RL 1945, §8354; RL 1955, §172-132; am L 1959, c 203, §14; am L Sp 1959 2d, c 1, §15; am L 1963, c 114, §3; am L 1965, c 111, §2]

§416-124—Trustee; powers, liabilities, duties. The title to all assets and property, real, personal, and mixed, belonging to the corporation shall, immediately upon the dissolution thereof, unless by decree of court of competent jurisdiction it is otherwise ordered, vest in the trustee or trustees for the

creditors and stockholders or members of the corporation dissolved.

Under the name of the trustee or trustees of the corporation dissolved (or under the name of the survivors of the trustees), unless and until some other person or persons are appointed by some court of competent jurisdiction, the trustee or trustees shall have power: to sue for and collect the debts, claims, and demands due to the corporation, or compound and settle any claims as they may deem best; to have, hold, reserve, sell, and dispose of property, real, personal, and mixed; to adjust and pay all debts of the corporation dissolved; to proceed as speedily as practical to a complete winding up of the corporation and, to that end, to exercise all powers of the dissolved corporation; to file bills for instructions in any court of competent jurisdiction on any matters concerning the administration of the assets under their control; to divided among the stockholders (or members if under the charter of the corporation they are entitled thereto) moneys and other properties that remain after paying the debts and necessary expenses; and they shall be jointly and severally liable to the creditors and to the stockholders or members if under the charter of the corporation the members are entitled to a distribution of the remaining property of the corporation to the extent of the corporation property which shall come into their hands.

The corporation may enter into a contract or agreement with any person or persons who are requested by the corporation to act as trustee or trustees, covering the administration of the assets and properties of the corporation, and if such persons are appointed trustees as herein provided, the contract shall in all respects be effective and shall be binding upon the corporation to the full amount of the assets coming into the hands of the trustees, provided that no contract shall prejudice the rights secured by law to the creditors of the corporation. [L 1939, c 95, §4; RL 1945, §8355; RL 1955, §172-133; am L 1959, c 203, §15]

Appendix E

RULES OF HAWAII SUPREME COURT
RULE 15. ADMISSION TO THE BAR.

(a) Applications. Every applicant for admission to the bar shall file with the clerk a verified typewritten application in duplicate, setting forth his name and age, that he is a citizen of the United States of America and bears no allegiance or fidelity to any foreign state or sovereign, his last place of residence, the character and term of his study, from what institution of law he has been graduated and with what degree. He shall state the names of all courts to which he has made applications to practice, the dates he has made applications to practice, the dates he has taken examinations and the dates he has been admitted to practice. He shall state whether he has been the subject of any investigation or proceeding for professional misconduct or whether he has ever been rejected upon an application to practice before any court. The application shall be accompanied by the recommendation of at least two attorneys of this court and by such other relevant documents or information as may be called for by the court or by the board of examiners. The recommendations shall set forth the length of time, when, and under what circumstances they have known the applicant, and their appraisal of the applicant's moral character. Unless otherwise ordered, applications shall be filed at least 60 days prior to the date of examination. The statements contained therein shall be investigated by the board of examiners, who shall report the results of their investigation to the court, together with their recommendations thereon. Prior to any admission, the court shall be satisfied of the good moral character of the applicant.

(b) Education Requirements. No applicant who is not a graduate of a law school approved by the Council of the American Bar Association on Legal Education and Admis-

sions to the Bar, shall be admitted to practice in this court; provided that an attorney admitted to practice before the highest court of one or more states, territories or the District of Columbia, who is not a graduate of a law school so approved but who has actively practiced law in such states, territories or the District of Columbia for 5 of the 6 years immediately prior to his application, shall be eligible for examination and admission. Service as a judge of a court of record shall be considered the equivalent of active practice of law within the meaning of these rules. Any attorney, whether an American citizen or not, may be permitted to associate himself with a member or members of the local bar in the presentation of a specific case at the discretion of the presiding judge or judges.

(c) Residence Requirements. In order to enable the board of examiners to have sufficient time and opportunity to investigate the applicant's moral character as required by this rule, no person shall be admitted unless he is and will have been continuously an actual and bona fide resident of the State of Hawaii for three months immediately prior to being admitted and shall have been physically present within the State of Hawaii for at least 75% of the said three month period.